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## Oil on troubled waters: Multi-national corporations and realising human rights in the developing world, with specific reference to Nigeria

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*It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against oppression, that human rights should be protected by the rule of law.<sup>1</sup>*

*It is like paradise and hell. They have everything. We have nothing ... if we complain they send soldiers.<sup>2</sup>*

### Summary

*This article examines the current state of tension in the Niger Delta of Nigeria. It locates the current unrest in the continued denial of economic, social and cultural rights to the oil-rich communities in the area. The author argues that this denial happened with the complicity and acquiescence of the international community. The Nigerian government as well as multi-national corporations operating in the area have not been responsive to the development needs of the people. The article argues that, although the primary obligation for realising the economic, social and cultural rights of*

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<sup>1</sup> Preamble to the Universal Declaration of Human Rights, 10 December 1948 UN GA Res 217 A (III), UN Doc A/810 71 (1948).

<sup>2</sup> Eghare Ojiogor, Chief of the Ugborodo community, an oil-rich area in Delta State, Nigeria, quoted in Amnesty International 'Claiming rights and resources: Injustice, oil and violence in Nigeria' <http://web.amnesty.org/en/library/info/AFR44/020/2005> (accessed 12 January 2007).

*host communities rests on the government, multi-national corporations in developing countries, considering their awesome resources and influence on government policies, should be similarly obligated to respect, promote and protect those rights.*

## 1 Introduction

Successive Nigerian governments have continually denied the people of the oil-rich Niger Delta area of the country their economic, social and cultural rights, and, by extension, their right to development. This has led to social restiveness, and lately, the agitation of varying colourations in the area. The social discontent manifests itself in paramilitary criminality, hostage taking, the sabotage of oil installations and car bombings in the area.<sup>3</sup>

This has resulted in substantial economic losses for the major beneficiaries of oil exploration in Nigeria: the Nigerian state and the multi-national corporations (MNCs) operating in Nigeria. The latter include Shell Petroleum Development Company (Shell), Texaco, Total, Exxon-Mobil and Chevron. The impact is felt globally in high oil prices: Tensions in the Niger Delta have been identified as one of the factors responsible for the rise in international oil prices. When the Movement for the Emancipation of the Niger Delta (MEND), the most organised and militant group to emerge in the area, attacked some of Shell's installations on 16 January 2006, there was a \$1 per barrel rise in world oil prices the next day.<sup>4</sup> The situation resulted in the loss of over \$4,45b to the Nigerian government in 2006 alone.<sup>5</sup>

The people of the Niger Delta complain about environmental degradation resulting from oil exploration activities in the area, social deprivation and a lack of jobs. They have to contend with political marginalisation in the Nigerian polity and a dearth of infrastructures in their area. This is despite the fact that oil from the area accounts for a major share of the country's total revenue.

In Nigeria, economic, social and cultural rights do not form part of the constitutional Bill of Rights. They are provided for only as non-justiciable 'fundamental objectives and directive principles of state policy'.<sup>6</sup> Economic, social and cultural rights are dispersed in the various provisions of sections 14 to 18 of the Nigerian Constitution.

<sup>3</sup> International Crisis Group *Swamps of insurgency: Nigeria's Delta unrest* (Africa Report 115 2006) <http://www.crisisgroup.org/home/index.cfm?id=4310> (accessed 7 January 2007).

<sup>4</sup> International Crisis Group *Fuelling the Niger Delta crisis* Africa Report 118 (28 September 2006) <sup>6</sup> <http://www.crisisgroup.org/home/index.cfm?id=4394> (accessed 7 January 2007).

<sup>5</sup> E Amaefule 'Nigeria loses N570b to Niger-Delta crisis' *The Punch* 9 January 2007.

<sup>6</sup> Ch II Constitution of the Federal Republic of Nigeria 1999.

The country has, however, ratified the International Covenant on Social and Economic Rights (CESCR).<sup>7</sup>

The African Charter on Human and Peoples' Rights (African Charter)<sup>8</sup> guarantees economic, social and cultural rights and peoples' rights alongside civil and political rights. Nigeria ratified the treaty early on. The African Charter has, in accordance with the country's constitutional practice, been enacted (without amendment) as municipal legislation and incorporated into domestic law as far back as 1983.<sup>9</sup> It is also significant to note that, in spite of the non-justiciable status of economic, social and cultural rights under the Nigerian Constitution, the country has not entered a reservation, declaration or objection to any of the provisions of CESCR.

Nigeria as a state is a subject of international law. It may be argued that MNCs and the local communities are also 'subjects' of international law. This article proposes that international human rights law, in particular, provides a working template for achieving desired positive ends in the relationship of the state, the local communities and the MNCs through the institutionalisation of economic, social and cultural rights with the active participation of MNCs. Repressive measures can only exacerbate the volatile situation in the Niger Delta with serious consequences, not only for Nigeria and the MNCs, but for the international community as well. There is a threat of civil war in the region. The refugee problem this portends can be dire, granted that official 2006 provisional census figures put the country's population at over 140 million.<sup>10</sup> Even now, the country exports millions of economic migrants to various parts of Africa, Europe and the United States. A foreboding of conflict alone is capable of flooding not only Africa, but other parts of the world with refugees.<sup>11</sup> This is concomitant of an increasingly globalised world; political, social or economic action at a local level may sometimes impact on geographically far-flung locations.<sup>12</sup>

After part 1, the introduction, part two examines the current situation of restiveness in the oil-producing Niger Delta region of Nigeria. It situates this situation within the context of the historical, social, economic,

<sup>7</sup> Nigeria submitted its ratification to the UN on 29 July 1993 and it entered into force in the country on 29 October 1993.

<sup>8</sup> Adopted 27 June 1981, entered into force 21 October 1986, OAU Doc CAB/LEG/67/3 Rev 5, (1982) 21 *International Legal Materials* 58. Nigeria signed it on 31 August 1982 and ratified it in July 1983.

<sup>9</sup> African Charter on Human and Peoples' Rights (Ratification and Enforcement Act) ch A9 Vol 1, Laws of the Federation of Nigeria 2004.

<sup>10</sup> *BBC News* 'Population in Nigeria tops 140m' 29 December 2006 <http://news.bbc.co.uk/1/hi/world/africa/6217719.stm> (accessed 29 December 2006).

<sup>11</sup> International Crisis Group *Want in the midst of plenty* Africa Report 113 19 July 2006 <http://www.crisisgroup.org/home/index.cfm?id=44274> (accessed 8 January 2007).

<sup>12</sup> D Held 'Democratic accountability and political effectiveness from a cosmopolitan perspective' (2004) 39 *Government and Opposition* 365-366.

political and legal regimes of the largest black nation in the world. This is to highlight how the ongoing conflict has developed.

Part three analyses the significance of the African Commission on Human and Peoples' Rights (African Commission) decision on the economic, social and cultural rights of the Ogoni community of the Niger Delta, in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (SERAC case).<sup>13</sup> Part four focuses on the obligations of MNCs under international human rights law. It advances the Privity Theory as a legal basis for enforcing a sustainable obligation on MNCs for realising the economic, social and cultural rights of their host communities. Part five makes a case that the international community has been complicit in the denial of economic, social and cultural rights to the people of the Niger Delta.

## 2 Antecedents of the conflict

Oil, first drilled in 1956 at Oloibiri, a small community in the Niger Delta area of Nigeria, is at the centre of the current debacle. Nigeria, bolstered by soaring oil prices in the late 1960s and early 1970s, quickly shifted emphasis in its economy from agriculture to crude oil production. Oil currently accounts for over 90% of the country's total revenue. Nigeria's 35,9 billion barrels of proven oil reserves ensures its place as the largest producer of oil in Africa.<sup>14</sup>

Despite its enormous oil wealth, most communities in the Niger Delta are in a sorry state. Their problems include large-scale environmental degradation,<sup>15</sup> a lack of basic infrastructure and poor or non-existent social amenities. The unemployment rate of the youth is high, partly from poor education and a lack of skills. Life is literally 'hard' in the area.

The advent of democracy in Nigeria has witnessed repeated expressions of frustration by the local communities in the Niger Delta area. There has been 'a wave of attacks'<sup>16</sup> on oil installations in the Niger Delta. Virtually all the multi-national oil exploration companies have had to scale back their production and in some cases they had to declare an inability to guarantee the fulfilment of their existing contractual

<sup>13</sup> (2001) AHRLR 60 (ACHPR 2001).

<sup>14</sup> Energy Information Administration *Country analysis briefs: Nigeria 1* <http://www.eia.doe.gov/emeul/cabs/Nigeria/Oil/html> (accessed 12 June 2006).

<sup>15</sup> n 14 above, 2.

<sup>16</sup> BBC News 'Nigeria's shadowy oil rebels' 20 April 2006 <http://news.bbc.co.uk/1/hi/world/africa/4732210.stm> (accessed 13 February 2006).

obligations.<sup>17</sup> The continued tensions in the Nigeria Delta have earned the country the status of one in current or potential conflict.<sup>18</sup>

Shell has the largest operations in the Nigerian oil industry. A recent report commissioned by Shell declared that the level of conflict in the area was akin to that in Colombia and Chechnya.<sup>19</sup> While this may be an overstatement, it is a pointer to the state of near crisis existing in the Niger Delta.

## 2.1 A restive delta: Agitations for self-determination

The Ogoni Bill of Rights (Bill) was 'presented to the government and people of Nigeria' in November 1990. This was in the days of military dictatorship in the country. The Bill advanced by the Movement for the Survival of the Ogoni People (MOSOP) is indicative of the demands and agitations of the peoples of the Niger Delta. The Ogoni, while affirming their wish to remain a part of Nigeria, demand 'political autonomy' to participate in the affairs of the country as a 'distinct and separate entity' along with a right to the control of a 'fair proportion' of their resources for their development.

The Bill also demands the right to protect their environment and ecology from further degradation as well as the full development of the Ogoni language and culture. They demand an end to gas flaring and the payment of \$10 billion in royalties from oil produced in Ogoniland since 1958 and in compensation for environmental degradation suffered as a result.<sup>20</sup>

However, if the Ogoni struggle was the first to receive international attention in the context of the struggle for community-based control of the country's oil resources, it has been overshadowed in recent times by that of the Ijaw. In the Kaiama Declaration, issued in 1998, the Ijaw declared their resolve to cease recognition of all<sup>21</sup>

undemocratic Nigerian state legislations such as the Land Use Decree, 1978 and the Petroleum Decrees of 1969 and 1991, the Lands (Title Vesting, etc) Decree No 52 of 1993 (Osborne Land Decree), the National Inland Waterways Authority Decree No 13 of 1997, etc.

In essence, the Ijaw 'repealed' all the legislations they deemed to facilitate the vesting of the land and natural resources, namely oil and gas, on the Federal Republic of Nigeria. It is now a matter of public record

<sup>17</sup> Human Rights Watch 'The Niger Delta: No democratic dividend' <http://www.hrw.org/reports/2002/nigeria3/nigerdelta.pdf> (accessed 10 September 2006).

<sup>18</sup> *Crisis Watch* 41 2 January 2006 4 [http://www.crisisgroup.org/library/documents/crisiswatch/cw\\_2007/cw41.doc](http://www.crisisgroup.org/library/documents/crisiswatch/cw_2007/cw41.doc) (accessed 10 January 2007).

<sup>19</sup> *BBC News* 'Nigerian oil fuels Delta conflict' 25 January 2006 <http://news.bbc.co.uk/2/hi/africa/4617658.stm> (accessed 10 January 2007).

<sup>20</sup> Ogoni Bill of Rights <http://www.waado.org/nigerdelta/RightsDeclaration/Ogoni.html> (accessed 6 January 2007).

<sup>21</sup> Kaiama Declaration (11 December 1988) [http://ijawcenter.com/kaiama\\_declaration.html](http://ijawcenter.com/kaiama_declaration.html) (accessed 9 February 2008).

that militants in the name of the Ijaw cause have engaged the Nigerian state and MNCs in the Niger Delta (home of the Ijaws and sundry ethnic groups) in an ongoing violent conflict. A number of palliative measures, including the zoning by the Vice-Presidency of the ruling party in the 2007 general elections, the historic appointment of an Ijaw as the Chief of Army and another as the Inspector-General of Police, have so far been unsuccessfully employed to assuage their feelings of neglect and exclusion from the mainstream of power in the country.

## 2.2 Position of the multi-national corporations

The attitude of Shell to the Ogoni Bill of Rights typifies the response of MNCs in the Niger Delta. Shell maintains that these demands are 'clearly political' as well as 'constitutional' and thus 'outside the influence' and 'jurisdiction of a private oil company'.<sup>22</sup> It also 'completely rejects all accusations of the abuse of human rights'. This culture of denial is at the heart of the present conflict in the Niger Delta. The escapist stance is typical of the response of MNCs to the realisation of economic, social and cultural rights of the communities they operate in, particularly in developing countries. To cite but one example, following the 3 December 1984 Bhopal incident, which has been referred to as the 'world's worst industrial disaster',<sup>23</sup> Union Carbide Industries maintained the incident which resulted in the loss of thousands of lives<sup>24</sup> (thousands are reportedly still dying or suffering debilitating health conditions in the aftermath)<sup>25</sup> was due to sabotage rather than its own negligence.<sup>26</sup> This was in spite of the fact that the company had reportedly ignored several warnings on the danger its manufacturing operations posed to the local population.

Shell insists that it has made its largest 'social investment' in the area compared to all others in which it operates. As far as it is concerned, the fuss being made around the issue of 'environmental devastation'

<sup>22</sup> Shell Nigeria Press Release 'Shell's submission' (to the Oputa Panel sitting in Port Harcourt Rivers State, Nigeria 23 January 2001) 3 [http://www.shell.com/home/content/nigeria/news\\_and\\_library/press\\_releases/2001/2001\\_2301\\_01031504.html](http://www.shell.com/home/content/nigeria/news_and_library/press_releases/2001/2001_2301_01031504.html) (accessed 11 September 2006).

<sup>23</sup> Green Peace has led an over two decades-old campaign for justice for victims of the incident. See eg Green Peace Bhopal *The world's worst industrial disaster* <http://www.greenpeace.org/international/footer/search?q=worst+industrial+disaster> (accessed 13 September 2006). For a detailed analysis of the incident, see I Eckerman *The Bhopal saga - Causes and consequences of the world's largest industrial disaster* (2004).

<sup>24</sup> Union Carbide admits 3 800 died, but twice and even much higher figures (as much as 10 000) have been cited by independent observers, eg, Amnesty International puts the figure at 7 000. See *Clouds of injustice- Bhopal 20 years on* <http://www.amnesty.org/en/library/info/ASA20/01512004> (accessed 13 September 2006).

<sup>25</sup> R Dhara & R Dhara 'The Union Carbide disaster in Bhopal: A review of health effects' (2002) 57 *Archives of Environmental Health* 391.

<sup>26</sup> Bhopal Information Centre *Statement of Union Carbide Corporation regarding the Bhopal tragedy* <http://www.bhopal.com/ucs.htm> (accessed 13 September 2006).

is a deliberate attempt to 'attract attention to justifiable development needs of the Niger Delta'.<sup>27</sup> The company's position hinges on the concept of corporate social responsibility, largely based on the normative perspective of positive voluntary action, and finds support in some quarters. The weakness associated with it has been traced not to the normative basis but the exclusion of the local communities in the implementation of the model as a development initiative.<sup>28</sup> But the foregoing statement clearly constitutes an implicit admission of the deprivation of the people in the area, despite supposed 'huge social investment' of the company. It leaves a question mark on the validity of such claims. More importantly, it acknowledges the right of the peoples of the Niger Delta to economic, social and cultural rights, including the right to development. Despite ongoing contestations, there is now international affirmation of the right to development.<sup>29</sup>

### 2.3 Political and legal framework

The Nigerian state, as represented by the federal authorities, who control the nation's natural resources, has exhibited mixed reaction to the situation. It hovers between repression and pacification. Successive military regimes receive the greatest blame for the current state of under-development and violent conflict in the Niger Delta. In 1994, the military ruler, General Sanni Abacha, ordered the trial of writer and human rights activist Ken Saro-Wiwa and eight others. This followed a communal conflict between supporters of the regime and its opponents led by the late Saro-Wiwa. The 'Ogoni 9' (some members of the faction in opposition to the government) were tried, convicted and executed in breach of due process. The ensuing protests in Ogoniland were met with a militarisation of the area. The aggrieved community had earlier forced Shell to shut down its operations in 1993.

As noted earlier, the Nigerian Constitution provides only for civil and political rights. Economic and social rights are variously interspersed and only provided for as part of the 'fundamental objectives' and 'directive principles of state policy'. These objectives, stated in chapter II of the Constitution, include a duty on the state to protect and improve the environment and safeguard the water, air, forest, land and wild life of Nigeria, and to provide free education at all levels. State policies must ensure the provision of suitable and adequate shelter, food, a reasonable national minimum wage and pension rights.

Section 13 of the Constitution provides that it 'shall be the duty and responsibility of all organs of government, and of all authorities and

<sup>27</sup> n 22 above.

<sup>28</sup> U Idemudia & UE Ite 'Corporate-community relations in Nigeria's oil industry: Challenges and imperatives' (2006) 13 *Corporate Social Responsibility and Environmental Management* 194.

<sup>29</sup> A Sengupta 'The human right to development' (2004) 32 *Oxford Development Studies* 179.



persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of the chapter. But section 6(6)(b) of the Constitution overrides any attempt at judicial review or enforcement of the rights that can be deduced from the section. It provides that the judicial powers conferred by the section shall not<sup>30</sup>

except as otherwise provided by this Constitution, extend to any issue as to whether any act or omission by any authority or person or as to whether any law or judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.

The Nigerian Bill of Rights, contained in chapter IV of the Constitution, excludes economic, social and cultural rights. It has thus become a feature of Nigerian constitutional law that fundamental principles of state policy are non-justiciable. Like similar provisions in the Indian Constitution, they are exhortations of best practice. The Supreme Court re-affirmed this principle in *Attorney-General of Ondo State v Attorney-General of the Federation and 35 Others* (JCPC case).<sup>31</sup> It held, among others, that the provisions of the Fundamental Objectives and Directive Principles of State Policy can only be enforced through the promulgation of laws.<sup>32</sup>

The provisions of the Nigerian Constitution, it can be argued, do not fulfil the country's obligations as a state party to CESC. The country therefore falls into the category of state parties to CESC who treat the Covenant with suspicion. These countries dichotomise human rights, according primacy to civil and political rights perceived as *negative* rights that do not require economic commitment by the government. Economic, social and cultural rights, on the other hand, are perceived as *positive* rights with the need to commit financial resources, often leading to a redistribution of wealth.

Such a perception, as noted by Eide,<sup>33</sup> is wrong. It has been posited that, in accordance with the provisions of sections 55 and 56 of the Charter of the United Nations,<sup>34</sup> all nations are bound to observe economic, social and cultural rights in the same way as civil and political rights.<sup>35</sup> It is equally worth noting that the International Covenant on Civil and Political Rights (CCPR)<sup>36</sup> strengthens the argument for the non-divisibility of rights. Article 1 provides as follows

<sup>30</sup> Constitution of the Federal Republic of Nigeria, 1999.

<sup>31</sup> (2002) 6 SC Pt I 1 (179).

<sup>32</sup> n 31 above, 69.

<sup>33</sup> A Eide 'Economic social and cultural rights' in A Eide *et al* (eds) *Economic, social and cultural rights* (2001) 8.

<sup>34</sup> Adopted at San Francisco 26 June 1945; entered into force 24 October 1945 1 UNTS xvi.

<sup>35</sup> A Sengupta 'Realising the right to development' (2000) 31 *Development and Change* 553-554.

<sup>36</sup> Adopted at New York 16 December 1966; entered into force March 1976 GA Res 2200A (XXI) UN Doc A/6316 (1966) 999 UNTS 171.

- 1 All peoples have the right of self-determination ... and [they] *freely pursue their economic, social and cultural development*.
- 2 All peoples may, for their own needs, freely dispose of their natural resources .... In no case may a people be deprived of its own means of subsistence.

Section 162 of the 1999 Constitution of Nigeria attempts to address the need for special provisions for the Niger Delta. It provides a 'derivation fund' for oil-producing communities. Section 162(2) provides for the distribution of federal revenue in a manner that ensures that at least 13% of the revenue derived from natural resources is allocated to the source of derivation.

The current administration, it appears, took advantage of the benefit of hindsight. It established, by legislation, the Niger Delta Development Commission (NDDC) in 2000. The NDDC is an interventionist institution meant to address decades of social and infrastructural under-development of the Niger Delta. Its primary aim is to 'conceive plans and implement programmes for the sustainable development' of the region.<sup>37</sup> The creation of the NDDC appears to be ordinarily in conformity with the provisions of article 2(1) of CESC, which require state parties 'to take steps ... by all appropriate means, including particularly the adoption of legislative measures'. The creation may be a step in the right direction, considering the dire needs of the Niger Delta. However, it is argued that the establishment of the NDDC falls short of the government's obligations under CESC.

All individuals resident in Nigeria, and not just the Niger Delta peoples, are entitled to the enjoyment of economic, social and cultural rights. In particular, article 2(1) of CCPR provides that each state undertakes to 'respect and ensure to all individuals within its territory and subject to its jurisdiction' the rights recognised in the Covenant, 'without distinction of any kind'. But no other part of Nigeria suffers from the same problems as those of the Niger Delta that required the establishment of the NDDC. The creation of the NDDC can be considered a positive measure to redress the imbalances in the Niger Delta identified above. International human rights recognise the principle of 'affirmative action' with the general prohibition of non-discrimination. This position finds support in the decisions of the Human Rights Committee (HRC) in its General Comment No 18 in relation to affirmative action under CCPR,<sup>38</sup> and its General Comment No 5 on CESC.

Further, adequate provision is not made for the democratic representation of the local communities on the board of the NDDC. There is a need to accord them such rights under articles 1(1) and 21 of CESC and African Charter respectively. Feelings of neglect go to the heart

<sup>37</sup> Sec 7 Niger Delta Development Commission Act 2000.

<sup>38</sup> Nigeria submitted its ratification on 29 July 1997 and it entered into force in the country on 29 October 1993.

of the matter.<sup>39</sup> Community stakeholder representation is crucial to allow the representatives of the communities to prioritise their needs and allocate resources in the most efficient manner. In all events, it engenders trust for the organisation among the communities it is meant to serve. The present situation, where government appointees, though from various ethnic, corporate and other interest groups in the country, constitute the board of the NNDC and dictate its priorities, violates the rights of the communities to adequate representation.

Ironically, some of the foregoing 'gains' are being eroded by a number of actions taken by the federal government itself. One is a legal action, in which it sought and obtained a declaration which limits the proportion of accruable revenue to the oil-producing areas under the 'principle of derivation'. This followed the agitation by states of the Niger Delta for a larger share of federal funds through the principle.

The Supreme Court of Nigeria in *Attorney-General of the Federation v Attorney-General of Abia State and 35 Others*<sup>40</sup> (Resource Control case) declared that the littoral states (including the Niger Delta) had no claims to resources within the continental shelf of the country. This was in line with the position of the federal government. The littoral states, on the other hand, had contended that there was no basis for a distinction between onshore and offshore natural resources.<sup>41</sup> The communities of the Niger Delta regard this as another assault on their right to self-determination and control of their natural resources. However, the decision in the case was viewed as being unduly favourable to the federal (central) government. Eventually, the parties resorted to a political solution that somewhat assuaged the discontent of the littoral states.

The right of a people to control over their natural resources is widely couched and limited only by obligations to other sovereign states under international law. Article 21(1) of the African Charter provides as follows:

All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

The seemingly absolute terms of article 21(1) are not free from problems. The subsection seems to strongly suggest that every group that is regarded as a 'people' has an unqualified right to control its natural resources. But who are the 'people' in a multi-ethnic state? Is it, as claimed by the Ogoni, an ethnic stock ('nation') in a region or geographical location in an independent state? Or the agglomeration of ethnic groups in a defined territory (country) with certain other features

<sup>39</sup> n 3 above, 18.

<sup>40</sup> (No 2) [2002] 6 NWLR pt 764, 542.

<sup>41</sup> For an analysis of the case, see KSA Ebeku 'Nigerian Supreme Court and ownership of offshore oil' (2003) 27 *Natural Resources Forum* 291.

recognised within an international comity of nations like the UN? In the *SERAC* case, the African Commission actually noted that the origin of this provision is traceable to colonial times, when the resources of Africa were exploited by foreigners, so 'peoples' in that context was in relation to the African states under colonisation. However, the African Commission noted as well that in post-colonialism, African governments now have obligations under this provision to protect their citizens.

The issue is further complicated by the seemingly divergent position of CESCR on the matter. It is possible to argue that CESCR accords some legitimacy to the Supreme Court's decision in the *Resource Control* case. Support for this proposition can be obtained from a combined reading of the provisions of articles 1 and 4 of CESCR. While articles 1(1) and (2) guarantee the right of peoples to self-determination and the disposition of their natural resources 'for their own ends', the state may 'subject such rights only to such limitations as are determined by law'. Such limitations are only required to be compatible with the nature of 'these rights' (ostensibly economic, social and cultural rights). The only other limitation to this power of state parties is that the law must be aimed at promoting the general welfare in a democratic society. The position of the federal government of Nigeria, sanctioned by the Supreme Court limiting the claim of the Niger Delta communities to the low water mark of the sea rather than the continental shelf, appears to satisfy this criterion. After all, the need exists to ensure that there are adequate resources for other parts of the country.

Further support for the foregoing view would also appear to come from the *SERAC* case. The African Commission, while recognising the rights of the Niger Delta communities to health and a clean environment, affirmed that

[u]ndoubtedly and admittedly, the government of Nigeria, through NNPC, has the right to produce oil, *the income from which will be used to fulfil the economic and social rights of Nigerians.*

The *SERAC* case thus maintains the balance between the rights of communities who own natural resources and others in a state party. Resources-rich communities are entitled to have the wealth derived from their natural endowments committed to their development. The decision goes further to affirm the right of other communities within the same state, which may not be similarly endowed to a share of the resource wealth.

The seemingly restrictive approach to the interpretation of the right to resource control by 'peoples' in this case may also be connected with the definition of 'peoples' in the African Charter. Unique as the use of the term may be by the regional human rights instrument, its use in different articles is rather an anomaly. To compound the situation, the African Charter defines the term nowhere. The African Commission is likely to place a restricted definition on the concept of 'peoples'. This seems to be in accord with the history of the African human rights

system with its sensitivity to the issue of national sovereignty and the correlative principle of non-interference.

## **2.4 The attack on Odi town: Another round of human rights and due process violations**

In November 1999, Odi town in the Niger Delta was burnt down by armed soldiers, ostensibly with the acquiescence of the Nigerian government. Several hundred people, including women and children, were massacred as they fled from their burning homes. This was a reprisal operation for the killing of 12 policemen by unruly youths, protesting the neglect of the community.<sup>42</sup> Government is yet to bring any of the soldiers to book. Prosecution does not appear to be on the government's agenda in this instance.<sup>43</sup> This, despite the fact that it is possible to trace the troops involved.

The Odi incident has been characterised by the Nigerian government as an isolated incident of the break-down of law and order. It is unlikely that the incident constitutes a 'war' situation and thus should not come under the purview of international criminal law. However, what cannot be contested is the fact that the rights of the victims were violated during the reprisal action. These include the right to life, health and property; all guaranteed by CCPR, CESC and the African Charter, to which Nigeria is party. These treaties create binding obligations of respect, promotion, protection and fulfilment on all parties. In this case, it translates into the requirement for the proper investigation and remedy for victims particularly in view of the use of lethal force by government security agents.

In summary, developing countries, like all other states, are the traditional subjects of international law. They bear primary responsibility for their treaty obligations. Despite the theory regarding the indivisibility of rights, the experience has been different in practice. Most states still do not make economic, social and cultural rights justiciable. A systematic erosion of the ability of developing countries to deliver on economic, social and cultural rights has accompanied the growth of MNCs. It is necessary that MNCs be made responsive to obligations to deliver on economic, social and cultural rights. For their part, the Niger Delta communities appear to have been driven to desperation, partly by the failure of the Nigerian government to heed the decision of the African Commission in the *SERAC* case.

<sup>42</sup> I Okonta 'The lingering crisis in Nigeria's Niger Delta and suggestions for a peaceful resolution' (2000) [http://www.cdd.org.uk/resources/workingpapers/niger\\_delta\\_eng.htm](http://www.cdd.org.uk/resources/workingpapers/niger_delta_eng.htm) (accessed 31 January 2008).

<sup>43</sup> Amnesty International (n 2 above) 2.

### 3 The *SERAC* case

This part of the article examines how the *SERAC* case sets the tone for the subsequent recognition of the economic and social rights of the oil-bearing communities in the Niger Delta. I will argue that the *SERAC* decision constitutes a model for the recognition of economic, social and cultural rights. The challenge faced by such a position, however, is whether the rights affirmed by the decision have or can be brought home to the local communities of the Niger Delta.

The *SERAC* case was an attempt on behalf of the people of Ogoniland to assert and enforce their economic, social and cultural rights. The applicants (two non-governmental organisations (NGOs) based in Nigeria and the United States respectively) alleged that the oil exploration activities of Shell had caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni people. They complained, among others, that the multi-national corporation had been in violation of applicable international law on environmental standards. This had resulted in various health complications for the people of the community.

Further, they claimed that the Nigerian military government that was in power at the time not only failed to monitor the activities of Shell, but also condoned and facilitated these breaches of international standards. Also of interest is the complaint that the Ogoni communities were neither consulted about, nor involved in, the decisions affecting the development of Ogoniland. Rather, efforts at protesting such violations had been met with the destruction of their homes and the execution of Ogoni leaders.

The African Commission found for the applicants on all the alleged violations. It held that the rights to life, health as well as a good environment guaranteed by the African Charter had been violated. In accepting and determining the application under section 56 of the African Charter, the African Commission set a precedent for the justiciability of economic, social and cultural rights. This is relevant regionally and globally.

The African Commission stated that, being a party to the African Charter as well as CESC, Nigeria has an obligation to respect, promote, protect and fulfil its treaty obligations. This pronouncement, extending the frontiers of protection to economic, social and cultural rights, is significant in the context of Nigeria, whose Bill of Rights excludes the protection of economic, social and cultural rights.

Further, the African Commission upheld the right of the Ogoni to freedom from exploitation guaranteed under article 21(5) of the African Charter. It affirmed the duty of the Nigerian state to 'eliminate all forms of economic exploitation, particularly that practised by international monopolies' to enable the 'peoples to fully benefit from the advantages derived from their natural resources'.

*SERAC* further stressed the position under international law that a

state can be held responsible for the acts of its agents, both public and private. It affirmed the obligations of states under international law to ensure, through executive and legislative action, that private actors such as MNCs refrain from violations of economic, social and cultural rights and other rights of every person within the Nigerian state. The only problem with this approach is that MNCs have deeper pockets than some poor states, so it would have been better to go directly after them for better redress for human rights victims.

Further, the African Commission stated that there was a violation of the right to representation. It stated that an adequate opportunity for representation in the 'development decisions affecting the communities' was an obligation placed on the government. This, it declared, was in accordance with the spirit of articles 16 and 24 of the African Charter.<sup>44</sup>

The decision further emphasised that collective and environmental rights as well as economic, social and cultural rights are 'essential elements of human rights in Africa'. No other regional adjudicatory system puts the case more forcefully. However, the viability of pursuing the recognition and enforcement of these rights in the Nigerian domestic forum remained largely untested, until two recent decisions. Before examining these cases, it is important to stress a reservation regarding the *SERAC* and other decisions of the African Commission.

Admittedly, the advisory nature of the decisions of the African Commission has attracted strong criticism.<sup>45</sup> What is the use of recommendations that may be and are largely ignored in practice? A response to this reservation about the African Commission is that the Commission does articulate applicable human rights standards at a regional level. That makes it arguably easier for state parties to identify with its decisions and not consider them imperial impositions and opportunistic neo-colonialism. The African Commission itself affirms this relativist approach, when it declared that<sup>46</sup>

[t]he uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples' Rights impose upon the African Commission an important task. International law and human rights must be responsive to African circumstances.

African countries, particularly the founding fathers of the Organisation of African Unity (OAU), were decidedly wary of the international human rights regime. They very jealously guard their sovereignty against perceived mechanisms for interference with their newly and sometimes

<sup>44</sup> *SERAC* case (n 13 above) para 53.

<sup>45</sup> M Mutua 'The African human rights system: A critical evaluation' <http://hdr.undp.org/en/reports/global/hdr2000/papers/mutua.pdf> (accessed 31 January 2008). For a comprehensive exposition of the genesis of the African Charter, see F Ouguerouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2004) 20-48.

<sup>46</sup> *SERAC* case (n 13 above) para 68.



hard-won independence. This was largely responsible for their reluctance to warm up to the idea of human rights. Thus, there is scarce mention of human rights in the Charter of the OAU, unlike the UN Charter. However, the increased universal awareness and acceptability of the notions of human rights<sup>47</sup> and its primacy in the contemporary state, has been reflected in the Constitutive Act of the African Union (AU).

The Preamble of the Constitutive Act, for instance, provides *inter alia* that the Heads of State and Government of the member states are 'determined to promote and protect human and peoples' rights'. Further, article 3(h) of the Act states that one of the objectives of the AU shall be to promote and protect human and peoples' rights in accordance with the African Charter and other relevant human rights instruments. Provisions on the new focus on human rights are contained in article 4 of the Act. It is clear that the African Commission has played a central role in actuating this turn-around.

In sum, *SERAC* is in line with the principle that rights are indivisible and that economic, social and cultural rights have the same force and justification as civil and political rights.<sup>48</sup> Judicial developments in Nigeria after the *SERAC* case demonstrate the cardinal role the African Commission can play in developing human rights law and practice within the African context.

#### 4 Vistas of hope

The ice surrounding the justiciability of economic, social and cultural rights in Nigeria has been broken by two cases decided in Nigerian courts. Like the *SERAC* case, they both challenge violations by MNCs of human rights in their operations in the Niger Delta. The pride of place for the pursuit and realisation of economic, social and cultural rights before the Nigerian courts should perhaps go to the decision in *Jonah Gbemre v Shell Petroleum Development Company and 2 Others*.<sup>49</sup>

The plaintiff brought the action on behalf of himself and the Iwherekan community in Delta State. In the action, supported by three NGOs, Friends of the Earth (Nigeria), Climate Justice Programme (United Kingdom) and Environmental Rights Action, he claimed *inter alia* that the flaring of gas by the company within the Iwherekan community constituted a violation of the right to life and human dignity under the Constitution of the Federal Republic of Nigeria, 1999, and articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights

<sup>47</sup> JK Mapulanga-Halston 'Examining the justiciability of economic, social and cultural rights' (2002) 6 *The International Journal of Human Rights* 29.

<sup>48</sup> Mapulanga-Halston (n 47 above).

<sup>49</sup> Suit FHC/B/CS/53/05, Federal High Court of Nigeria, Benin (CV Nwokorie presiding judge) 14 November 2005 (order made 15 November 2005). See 'Nigeria: Court stops gas flaring Shell appeals' *The Guardian* 15 November 2005.



(Ratification and Enforcement) Act referred to above. For its part, the first defendant denied it was flaring gas in the Iwherekana community. It further argued that in all events, gas flaring was authorised by section 3 of the Associated Gas Re-Injection Act and section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations, 1984.

In its judgment, the court declared that gas flaring is dangerous to the health of individuals and deleterious to the environment and that its failure to carry out an environmental impact assessment was illegal. Further, it held that the actions of the MNC in flaring gas were illegal and a violation of the constitutionally guaranteed, fundamental rights to life and human dignity as contained in sections 33(1) and 34(1) of the Constitution, as well as articles 4, 16 and 24 of the African Charter. In upholding his claim, the Federal High Court ordered Shell to stop gas flaring. An important aspect of the decision is the Court's voiding of sections of the Associated Gas Re-Injection Act and Regulations relied upon by the first defendant for being inconsistent with the applicants' constitutional rights.<sup>50</sup>

In the second case, *Ijaw Aborigines of Bayelsa State v Shell*,<sup>51</sup> a group of Ijaw from Bayelsa State instituted an action against Shell before the Federal High Court sitting in Port Harcourt. The plaintiffs sought an order of the court to enforce the payment of the sum of US\$ 1,5 billion awarded in damages for pollution, made to the oil-producing communities in the state by the Nigerian legislature after a public hearing by both parties before the National Assembly.

In its judgment of 24 February 2006, the Court held that Shell was bound to pay the sum which had been awarded by a resolution of the National Assembly. The Court stated that the resolution arose from a consensual attendance at the committee hearings of the National Assembly. Shell's lawyers had argued unsuccessfully that the Joint Committee of the National Assembly lacked the power to compel the company to pay. Shell has, however, appealed the decision.<sup>52</sup>

<sup>50</sup> The full text of the decision and enrolled order of the court respectively are available at <http://www.climatelaw.org/cases/country/nigeria/gasflares/2005Nov14> (accessed 10 February 2008). However, see the case of *Barr Ikehukwu Opkara & 4 Others* (for themselves and as representing Rumuekpe, Eremah, Akala-Olu and Idamah communities of Rivers State) *v Shell & 5 Others*, Suit FHC/PH/CS/518/05, Federal High Court of Nigeria, Port-Harcourt (unreported, judgment delivered on 29 September 2006). In the latter case, the court upheld the objection that under Nigerian law, human rights were personal and a representative action could not be maintained for its enforcement, specifically rejecting the precedent set in *Gbemre*. <http://www.climatelaw.org/cases/country/nigeria/gasflares/22092006> (accessed 10 February 2008). The decision has been appealed by the plaintiffs.

<sup>51</sup> Unreported case, judgment delivered by Justice Okechukwu Okeke, Federal High Court Port Harcourt, Rivers State, Nigeria on 24 February 2006.

<sup>52</sup> *BBC News* 'Shell told to pay Nigeria's Ijaw' 24 February 2006 <http://news.bbc.co.uk/1/hi/world/africa/4746874.stm> (accessed 10 September 2006) and Rhys Blakely and Agencies '£1.5bn Shell Nigeria fine upheld' <http://business.timesonline.co.uk/tol/business/market/africa/articles/34579.ece> (accessed 6 January 2007).

The significance and potential ramifications of the Federal High Court's decision were not lost on observers of international law. It was voted as the 'international law case of the month' when it was delivered.<sup>53</sup> Although the fulcrum of the case is the disputed implementation of what can best be described as an arbitral award, it is significant that the award itself constitutes formal recognition of the right to a clean, pollution-free environment, an important subset of economic, social and cultural rights.

The case provides a test case for the otherwise conservative Nigerian appellate judiciary to pronounce on the justiciability of economic, social and cultural rights beyond the narrow confines of whether the National Assembly, a legislative body, had the jurisdiction to make an award against Shell and also compel the MNC to pay. Specifically, the appellate courts had the challenge of developing the jurisprudence on the right to a pollution-free environment, sustainable development and damages for infractions of those rights. It is particularly significant that the African Charter has been domesticated as municipal legislation and should be considered by the appellate courts in this case. The case affords an opportunity for the courts to go beyond the consideration of the non-justiciable economic, social and cultural rights provisions in the Nigerian Constitution. Recourse should rather be had to the country's international human rights obligations. The jurisprudence articulated in the *SERAC* case is quite relevant as an authority on these issues.

The Court, in coming to this decision, established a link among the rights to life, health and a clean environment. The Court finds support and a precedent in the *SERAC* case, though explicit mention does not appear to have been made of it. The African Commission made the significant pronouncement in the *SERAC* case that 'pollution and environmental degradation to a level humanly unacceptable' amounted to a violation of the right to life of the Ogoni society as a whole.<sup>54</sup> As in the *Ijaw Aborigines* case above, Shell immediately appealed the judgment, but committed itself to a gradual phasing out of the obnoxious practice. An important feature of the judgment in *Gbemre* is that it links the right to life, popularly conceived of as a 'civil' right, with the right to a good environment, a 'social' right. In that way, the Court lends itself to the progressive conception of the indivisibility of all human rights. The implementation of these rights is problematic everywhere. It is instructive that the United States has not ratified CESC. Ironically, it played an important role in articulating the normative framework for the inclusion of economic, social and cultural rights in the UN Charter,

<sup>53</sup> R Alford 'Case of the month: *Shell v Ijaw Aborigines of Bayelsa State (Opinio Juris)*' <http://lawofnations.blogspot.com/2006/02/case-of-month-shell-v-ijaw-aborigines.html> (accessed 10 February 2008).

<sup>54</sup> *SERAC* case (n 13 above) 11-12.

the Universal Declaration of Human Rights (Universal Declaration) and CESCR.<sup>55</sup>

It is expected that the appellate courts in Nigeria will seize on the gauntlet provided by *Ijaw Aborigines* and *Gbemre* to tow the line of the Supreme Court of India and entrench economic, social and cultural rights as justiciable rights in Nigeria. India, like Nigeria and many other developing countries, also has non-justiciable provisions in respect of economic, social and cultural rights. However, the Court has utilised its interpretative powers to extend the frontiers of enforceable rights in the country. Take the example of the right to life guaranteed and justiciable under the Indian and Nigerian Constitutions. The Indian courts have consistently held that good health is cardinal to the enjoyment of the right to life.<sup>56</sup> Thus, the right to health is linked to the right to life. In today's globalised world, there is an urgent need for international law to proceed to extend its reach to major players in the enjoyment of economic, social and cultural rights, the ever-expanding MNCs.

## 5 Multi-national corporations and international human rights law

One of the central features of globalisation is the immense financial clout of MNCs. The phenomenon is a direct result of the democratisation of the global economic space championed by neo-liberal economics.<sup>57</sup> The flagrant neglect of economic, social and cultural rights by MNCs is somewhat of an irony. The disproportionate growth of MNCs in recent times stems from economic democracy. MNCs ought to be, even if only from the moral point of view, in the vanguard of human rights protection given its inextricable tie to democracy.

MNCs constitute some of, if not the principal actors in this new economic equation.<sup>58</sup> The new international economic order, promoted by the Bretton Woods institutions, has led to MNCs accumulating so many resources that they have become mega-actors on the international economic, social and political scene. In more than a few cases, the presence of MNCs 'has often removed decision making from the

<sup>55</sup> Eide *et al* (n 33 above). See also JS Gibson *Dictionary of international human rights law* (1996) 135-136 and Sengupta (n 29 above) 554.

<sup>56</sup> See eg *Paramand Katra v Union of India* [1989] AIR 1989 SC 2039; 1990 Cvi LJ 671 and *Bandua Mukti Morcha v Union of India* [1984] AIR 1984 SC 802. See also the High Court decision in *Mahendra Pratap Singh v State of Orissa* [1997] AIR 37.

<sup>57</sup> D Aguirre 'MNCs and the realisation of economic, social and cultural rights' (2004) 35 *California Western International Law Journal* 53 53.

<sup>58</sup> K Nowrot 'New approaches to the international legal personality of MNCs: Towards a rebuttable presumption of normative responsibilities' <http://www.esil-sedi.eu/english/pdf/Nowrot.pdf> (accessed 10 September 2006).

national sphere and state control'.<sup>59</sup> The immense influence of MNCs, Bengoa declares, has resulted in 'a clear loss of sovereignty on the part of the state and a greater globalisation of the decisions affecting the world's population'.<sup>60</sup> General Motors, a MNC, has 'a larger economy than all but seven nations'.<sup>61</sup>

Bengoa's view, considered in relation to developing countries, is that MNCs, particularly in the extractive industry, wield immense power in many developing countries, including Nigeria. The privileged position of MNCs as key players on the national and international scene ought to go with some responsibility.<sup>62</sup>

While MNCs are typically driven by the capitalist economic philosophy of profit maximisation, it must also be conceded that the primary responsibility in international human rights law lies with states.<sup>63</sup> This is because, essentially, human rights are a 'compact between governments and individuals'.<sup>64</sup> However, there is a progressive expansion of the reach of international law. Relevant private actors are now conferred with duties under international law. Individuals whose actions contravene international criminal law are held directly accountable. A definitive manifestation of this is the creation of the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda. The position finds further support in the creation of the International Criminal Court at The Hague for the trial of war crimes, crimes against humanity and genocide based on individual responsibility. Ratner has noted that international law can and should provide for a theory of corporate responsibility.<sup>65</sup> The 'privity theory', it is proposed, is a viable option.

### 5.1 Multi-national corporations and the privity theory

MNCs, with their supranational reach, currently exert increasing control over the lives of people everywhere. United Nations Conference on Trade and Development (UNCTAD) statistics show that their

<sup>59</sup> J Bengoa *Existence and recognition of minorities* Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Minorities (6th session, 22-26 May 2000) 9.

<sup>60</sup> n 59 above, 10.

<sup>61</sup> Aguirre (n 57 above) 54.

<sup>62</sup> C Backer 'Multi-national corporations, transnational law: The United Nations norms on the responsibilities of transnational corporations as a harbinger of corporate responsibility in international law' (2005) 37 *Columbia Human Rights Law Review* 287 highlights the growing scholarly debate on the issue in recent times. The article also comprehensively discusses the implications of the Norms on the regulatory relationship between states, MNCs and international institutions.

<sup>63</sup> Aguirre (n 57 above).

<sup>64</sup> K Bennouna 'Towards a human rights approach to armed conflict' (2004) 11 *University of California Davis Journal International Law and Policy* 171 180.

<sup>65</sup> SR Ratner 'Corporation and human rights: A theory of legal responsibility' (2001-02) 111 *Yale University Law Journal* 443 449

growth has out-paced total world output.<sup>66</sup> But that growth, despite its profound impact on the majority of the world's population, has been accompanied by a decidedly low level of corporate responsibility. The situation has attracted considerable opposition to their activities.<sup>67</sup> Their power in relation to local communities in developing countries, where they have some of their largest operations, is awesome. As mentioned earlier, it is a fact that the resources of MNCs often go beyond that of the countries in which they operate.<sup>68</sup> This reality creates an imperative for imposing direct obligations on them as relevant actors in the field of human rights.

The dominance of MNCs over economic and social policy dictates that they are made subject to the international human rights regime.<sup>69</sup> It must, however, be noted that some international law experts still question the validity of making private actors like MNCs the subject of international law.<sup>70</sup> Others assert that it is plainly unworkable.<sup>71</sup> However, there are many on the opposite side of the divide advocating the propriety of extending the jurisdiction of the international human rights regime to MNCs.<sup>72</sup>

Arguably, the whole construct of human rights law is essentially aimed at securing the dignity of the individual from the wide-reaching powers wielded by the state. In other words, human rights law is engaged to protect the susceptibilities of the 'weak' and 'vulnerable' (individual) from the 'strong' and 'invincible' (state).<sup>73</sup> The foregoing construct is dictated by the historical origin of contemporary human rights law dating back to World War II. In contemporary times, MNCs, though non-governmental, private entities, often conduct their business in a manner that intervenes in the relationship between the state and the individual. This intervention of MNCs is such that they bestraddle and actually overwhelm the latter. The very fact of 'affective intervention' justifies regulation of MNCs. At the least, such regulation should ensure the fulfilment of the obligations of the state to the individual.

A theory for conferring direct responsibility on MNCs under international human rights law, which does not appear to have been clearly

<sup>66</sup> UNCTAD *World Investment Report 2002: TNCs and export competitiveness*, Geneva, United Nations.

<sup>67</sup> M Koenig-Archibugi 'Transnational corporations and public accountability' (2004) 39 *Government and Opposition* 234-235.

<sup>68</sup> J Nolan 'Human rights responsibilities of transnational corporations: Developing uniform standards' (paper presented at the ANZIL Conference 18-20 June 2004, Canberra, ACT) (on file with author).

<sup>69</sup> Aguirre (n 57 above) 54-55.

<sup>70</sup> Nowrot (n 58 above) 4.

<sup>71</sup> Ratner (n 65 above).

<sup>72</sup> See eg Ratner (n 65 above); TF Maassarani *et al* 'Extracting corporate responsibility: Towards a human rights impact assessment' (2007) 40 *Cornell International Law Journal* 135.

<sup>73</sup> Nolan (n 68 above) 3.

articulated, is the 'privity theory'.<sup>74</sup> This follows on the 'weak' versus 'strong' paradigm. The basis of the state is the wilful submission of the individual of his rights and freedoms to the state in a 'social contract'. Thus, the state exists as an expression of the agglomeration of individuals' 'sovereignities'.

It can be posited that the social contract between the individual and the state dictates that concessions ('sub-contracts' in contract theory) made by the latter operate to bind the privy ('sub-contractor') to the head contract to the extent of the expected impact of such areas of operation. In that way, licencees and concessionaires (such as MNCs) can be made to take on some of the obligations of their principal (the state) and become bound to fulfil them based on the doctrine of privity of contract. They could then become substantially bound to perform some of the important 'terms' of the contract between state and society. Thus, MNCs, by virtue of the privity theory, will be required to observe some of the treaty obligations of the country.

It may be argued in some quarters that this proposition contradicts the law of treaties for seeking to create obligations for third parties without their consent. An alternative argument could then be canvassed that, under international law, states have an obligation not to allow their territory to be used to violate the rights of others; a principle well recognised under international environmental law.<sup>75</sup>

The position that responsibility for the realisation of international human rights lies primarily with the state does not obviate state licencees such as MNCs. Rather, it strengthens the position that consensual participants in state craft are bound by the same obligations as the government. In a way, they are 'extensions' of the government in that they operate in spheres implicitly reserved for government under the social contract theory. But they are 'extensions' that exercise undue weight over the primary structure, almost to the point of subduing the former.

Critics of a legal framework that seeks to extend the liability of MNCs for economic, social and cultural rights insist that states as sovereigns have the responsibility to ensure the realisation of the rights of their citizens. While it is conceded that normative sovereignty lies with the state, it is now generally recognised that there is a radical shift in the

<sup>74</sup> See E Palmer 'Multi-national corporations and the social contract' (2001) 31 *Journal of Business Ethics* 245 for an extensive discussion of the fundamentals of the 'contractarian' theory. He argues that 'reason requires that the activities of enterprises accord with standards of environmental and governmental sustainability in addition to consortium, national law and international agreements'.

<sup>75</sup> M Zurn 'Global governance and legitimacy problems' (2004) 39 *Government and Opposition* 260 268: 'International regimes for overcoming global environmental problems are typical examples here. The ultimate addressees of regulations issued by international institutions are largely societal actors. While the states act as intermediaries between the international institutions and the addressees, it is ultimately societal actors such as the consumers and businesses who have to alter their behaviour in order, say, to reduce CO<sub>2</sub> or CFC emissions.'

reach of state control. Although states have retained legal authority to protect their economies through numerous economic and political measures, the reality in the contemporary period is that the continued retention of those formal legal powers does not guarantee the attainment of state policy objectives. Rather, in order to ensure the welfare of their citizens, states have had to 'work with other powerful agencies' and are now 'obliged to share power'. The exercise of state power is now in the normative and, perhaps more so, in the political context, channelled through a 'fractured sovereignty'.<sup>76</sup> Perhaps nowhere is the effect of the paradigm shift in the cognitive limitations of state power over economic policies felt more than the (in)ability of developing countries to control the operation of MNCs due to the latter's awesome resources.

Existing legal positions that insist on exclusive state responsibility for the realisation of human rights are derived from the classical philosophical narrative in which the state possessed absolute sovereignty. Current realities have moved well beyond this traditional view. The development of connective technology, the conduct of globalised trading and economic relations, and the operation of international regulatory bodies, among other factors, have continued to seriously erode the power of states, particularly developing ones, to retain absolute command of their territories.<sup>77</sup> In view of the challenges posed by globalisation to the hitherto pre-eminent position of the state as the dominant player in economic and political affairs,<sup>78</sup> there is a compelling need to reassess the state-centric focus on realising economic, social and cultural rights in particular, and the welfare needs of citizens within a territory in general. Again, the peculiar developmental needs of local communities in developing countries (with decidedly weaker governmental structures), challenged by ever-expanding socio-economic globalisation dynamics, strongly recommend the adoption of a more inclusive and arguably pragmatic approach.

MNCs, like states, are bound to observe the obligations engendered by the voluntary actions of the state. An analogous example is the principal-agent relationship. In that relationship, the obligations of the principal bind the agent. Conversely, the actions of the agent in pursuance of his agency bind the principal. In this instance, the principal is the state with its obligations under international human rights as the guarantor of individual rights. MNCs constitute the state's concessionaires.

The case for regulation of MNCs and ensuring that international human rights law binds them is strengthened by the reality of the disproportionate swing in their growth. The 'opportunity cost' for their

<sup>76</sup> M Loughlin *Sword & scales: An examination of the relationship between law and politics* (2000) 145-147.

<sup>77</sup> Held (n 12 above).

<sup>78</sup> Loughlin (n 76 above) 140-144.



growth is the requirement for less state control of the economic sphere, which negatively impacts the delivery of economic, social and cultural rights.<sup>79</sup> Neo-liberal structural adjustment programmes imposed by International Financial Institutions (IFIs) require states to minimise government role in policy formulation and control of the economy. This erosion of state sovereignty appears designed to, or at least works in favour of, MNCs.

The case for a 'privity theory' to hold MNCs responsible for the realisation of economic, social and cultural rights is further invigorated by the recognition that 'transnationalised production challenges the standard model of public accountability of corporations through governmental action and supervision'. This has led to the identification of accountability gaps between MNCs and their hosts, particularly in weak states. The primary source of accountability, the government, all but abdicates that responsibility due to internal (some of which are structural deriving basically from underdevelopment) or external factors.<sup>80</sup>

According to Zurn, the external or rather extraneous element implicated is *reflexive denationalisation*.<sup>81</sup> Itself a product of an embedded liberalism, it has resulted in 'a process in which boundaries of social transactions increasingly transcend national boundaries' and, consequently, 'challenged the capacity of national policies to bring about desired social outcomes'. Specifically, the ability of the state to effectively intervene in the national socio-economic scene and to effect social welfare programmes in the interest of its nationals is severely handicapped by the 'rapid increase in direct investments and highly sensitive financial markets'.<sup>82</sup> The negative effects of the continually expanding global economic activities of MNCs are worst felt in developing countries. Thus, recourse to an externalised normative framework for facilitating the realisation of economic, social and cultural rights of the largely underprivileged communities in developing countries ought to be considered a viable option.

In sum, then, it can be asserted that the encroachment of MNCs into developing economies impede the delivery of economic, social and cultural rights in those largely weak states. Such rights are thereby neither diminished nor dissolved. They usually recede into abeyance to the detriment of residents/citizens of those countries. It can be contended that the vacuum created by the receding institutions of the state in favour of MNCs transfers at least some responsibility for the promotion, protection and fulfilment of the economic, social and cultural rights (and other rights for that matter) on the latter. That space

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<sup>79</sup> Aguirre (n 57 above) 54-5.

<sup>80</sup> Koenig-Archibugi (n 67 above) 238-245.

<sup>81</sup> Zurn (n 75 above) 262.

<sup>82</sup> Zurn (n 75 above) 265-266.



must be regulated under an imperative framework rather than on a voluntary-compliance basis.

## 6 International complicity?

For too long, the violation of the economic, social and cultural rights of local communities in developing countries has continued with the complacency of the international community. It may not be wrong to contend that there is complicity on the part of the international community on this issue. No doubt measures have been taken and initiatives introduced at the international level to hold MNCs responsible for economic, social and cultural rights. However, it would be contended below that these measures and initiatives have been weak and platitudinous. What is required is affirmative and enforceable action.

The UN Global Compact on MNCs (UN Global Compact), initiated in 1999 by former UN Secretary-General, Kofi Annan, is representative of such measures and initiatives. The drawback in its effectiveness is a reliance on voluntary compliance, for which it has been rightly criticised.<sup>83</sup> The UN Global Compact cannot be expected to substantially facilitate the resolution of the current debacle in the Niger Delta or the problems of other communities caught between the might of MNCs and inept governments, as it lacks the aspiration to monitor the standards it so eloquently advocates.<sup>84</sup>

The same can be said about the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (UN Norms),<sup>85</sup> despite its description as the most ambitious attempt at defining the corporate obligations of MNCs with regard to human rights. The Preamble to the UN Norms sets out an extensive list of human rights instruments, including those that deal with civil, political, economic, social and cultural rights which MNCs have an obligation to respect. Article 10 provides that, in the conduct of their operations, Transnational Corporations and other business enterprises 'shall recognise and respect applicable norms of international law, national laws and regulations, the public interest ...' Article 12 further elaborates that they

shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realisation, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom

<sup>83</sup> C Hillemanns 'UN norms on the responsibilities of transnational corporations and other business enterprises with regards to human rights' (2003) 4 *German Law Journal* 1055.

<sup>84</sup> However, see G Kell 'The global compact: Selected experiences and reflections' (2005) 59 *Journal of Business Ethics* 69 71-73 for the view that the UN cannot achieve a monitory/enforcement model and that such model is in any case undesirable.

<sup>85</sup> UN Doc E/CN.4/Sub.2/2003/12/Rev 2 (2003).

of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realisation of those rights.

These provisions are laudable for their comprehensiveness. Nevertheless, absent a monitoring and enforcement mechanism, they hardly advance the rights of MNCs' host communities. The UN Norms (and similar instruments) remain astute theoretical postulations on 'best practices', rather than mechanisms for realising its elegantly crafted provisions.

The current array of *initiatives* at the international and regional levels would not transcend the level of platitudes if they continue to be based on voluntary subscription and moral adjurations. The realisation of economic, social and cultural rights will likely affect the maximisation of profits, the 'bottom-line' of commercial enterprise. The formulation of the laudable principles around a non-enforceable and sanction-less framework does little to advance the rights of the weak and poor host communities. Tripathi, while discussing the regulation of MNCs in conflict zones, has argued that<sup>86</sup>

a company is not obliged to honour commitments it makes in any voluntary mechanism. Voluntary tools, therefore, are necessary but not sufficient to change a company's behaviour in a zone of conflict. This is equally applicable to the context of realising the economic, social and cultural rights of MNCs' host communities.

The 'soft law' approach may be commendable for its attempt at inclusiveness and fostering voluntary subscription by MNCs. Koenig-Archibugi, while arguing in support of the approach, observed that the voluntary commitment by MNCs to accountability provides information to consumers, investors and other stakeholders (the last group presumably includes indigent host communities) and greatly assists them in making informed choices.<sup>87</sup> The approach, he notes, is currently the favoured over enforceable mechanisms.<sup>88</sup>

In the context of European Community (EC) law, 'soft law' is best regarded as 'rules of conduct' or 'commitment' without binding legal force, but not without legal effect altogether.<sup>89</sup> The common expectation is that they can form the basis of customary international law or binding treaties.<sup>90</sup> This characterisation of the status of soft law is generally applicable in international law.<sup>91</sup> As non-treaty law, soft law is

<sup>86</sup> S Tripathi 'International regulation of multi-national corporations' (2005) 33 *Oxford Development Studies* 117-122.

<sup>87</sup> Koenig-Archibugi (n 67 above) 246.

<sup>88</sup> Koenig-Archibugi (n 67 above) 258.

<sup>89</sup> L Senden 'Soft law, self-regulation and co-regulation in European law: Where do they meet?' (2005) 9 *Electronic Journal of Comparative Law* 1-27 <http://www.ejcl.org/91/art91-3.PDF> (accessed 8 February 2008).

<sup>90</sup> J Rehman *International human rights law: A practical approach* (2003).

<sup>91</sup> P Malanczuk *Akerhurst's a modern introduction to international law* (1997) 54-55.

not recognised as creating legal obligations. At best, it is regarded as a different regime of 'law' which falls outside of the principles of treaty law under international law.<sup>92</sup>

Two distinctive objections can be raised against the 'soft law' approach as advocated by Koenig-Archibugi. First is the assumption that all consumers and stakeholders have a capacity to constructively assess the information provided under such voluntary mechanisms. This may well be the case in developed countries, where basic education can be taken for granted. However, it is a fact that inadequate education and, sometimes, a complete absence of basic education characterise underdeveloped countries. They are thus deprived of such access and consequently lose any benefits this may hold. The second objection derives from the assumption that consumers and stakeholders are socio-economically empowered to make any *choice* at all. This again is simply not the reality in underdeveloped or developing countries. Choices presuppose some level of empowerment, an asset rarely within the reach of low income-earning and less educated communities.

However, the voluntary mechanisms approach is probably more fundamentally flawed in its basic assumption that neo-liberal capitalism (the impetus for MNCs' operations) subscribes to some high notions of morality. Why should it be assumed that MNCs will be interested in respecting, protecting, promoting and fulfilling the obligations of their host states to the obvious detriment of their profits? Such an assumption is hardly based on past or recent experience. Take the Organisation for Economic Co-operation and Development Guidelines for the Operation of MNCs as an example. Its existence of over 30 years has not reversed the fact that MNCs from state parties constitute some of the worst violators of the human rights of host communities.<sup>93</sup>

The 'lethargic response'<sup>94</sup> of the international community to rein in MNCs and ensure the realisation of economic, social and cultural rights constitutes an abdication of its obligation under international human rights law. A number of international human rights law instruments oblige UN member states to ensure the realisation of economic, social and cultural rights by states and private actors. The Preamble of the Universal Declaration, while proclaiming it a common standard of achievement for all peoples and nations, imposes a duty on 'every individual and every organ of society to secure their effective recognition and observance, both among member states and among the peoples of territories under their control'. Articles 22 to 27 of the Universal Declaration provide for economic, social and cultural rights. This

<sup>92</sup> H Hillgenberg 'A fresh look at soft law' (1999) 10 *European Journal of International Law* 499.

<sup>93</sup> OECD Watch 1 April 2003 <http://www.germanwatch.org/tw/kw-inl01.pdf> (accessed 4 April 2006).

<sup>94</sup> Aguirre (n 57 above) 57.

clause in the Preamble, read together with articles 22 to 27, obliges the international community to go beyond imposing a duty on MNCs to respect the economic, social and cultural rights of local communities, as would appear to be the intent of the UN Norms. The Universal Declaration provisions further require definitive measures to ensure their implementation and enforceability. This may be better actualised by replacing the norms with an enforceable treaty.

Further, and perhaps of greater significance, are the implications of articles 55 and 56 of the UN Charter. Article 55 stipulates that the UN shall promote higher standards of living, full employment and conditions of economic development. The UN is also obliged to ensure universal respect for human rights and observance of human rights and fundamental freedoms for all. Article 56 emphasises the imperative nature of this duty, affirming that all members *pledge* their commitment to take *joint and separate action* to ensure the achievement of the purposes set out in article 55.

In light of the provisions of articles 55 and 56 of the UN Charter, developed countries in particular have an obligation to ensure the regulation of MNCs. This is particularly so in view of the fact that they invariably are the 'home' states of the MNCs. Thus, MNCs, even as corporate individuals, are their 'citizens'. They are obliged at the national level to regulate the conduct of MNCs' of their business, both within their territories and, arguably, internationally.

The foregoing proposition on extra-territorial regulation of MNCs is not alien to international law. Under international criminal law, for instance, nationals of a country can be tried in their home countries for offences committed abroad. The existence of this principle can be extended to international human rights law to scrutinise and regulate the activities of MNCs by developed home states. Such regulation is particularly germane now that MNCs are not easily amenable to regulation and control by developing countries keen on attracting or retaining them.

According to a pragmatic view of the current situation, genuine and concerted international action is required to combat the enormous reach of MNCs. Aguirre has noted that 'the MNC has transcended national legal systems and ignored the feeble international system to make the imposition of human rights [on them] nearly impossible'.<sup>95</sup> But regulated they must be, as neglect can threaten global peace.

Developing countries, faced with the dilemma of de-emphasising economic, social and cultural rights to gain on competitiveness or close regulation of MNCs and lose out on Direct Foreign Investments (DFI), usually settle for the former. The apprehension that MNCs may move their operations elsewhere to obtain the benefits of fewer regulatory

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<sup>95</sup> Aguirre (n 57 above) 56.

burdens, is a potent one for developing countries at least.<sup>96</sup> They are constrained by the 'race to the bottom'<sup>97</sup> to avoid adequate regulation of MNCs.

Considering their awesome resources, regulation of MNCs cannot be achieved without the co-operation of their 'home' countries. They hold the key to effective and compulsory regulation of MNCs considering their advantaged status. They benefit immensely from the profits of MNCs in the form of taxes and profit repatriation. They owe more than a moral obligation to ensure the delivery of economic, social and cultural rights by their 'proxies', MNCs. Their co-operation in achieving this laudable objective is required under the UN Charter and other legal instruments that constitute the very foundations of international law.

## 7 Conclusion

In many developing countries, economic, social and cultural rights are still non-justiciable. The role of NGO advocacy to challenge the neglect and violations of these rights cannot be over-emphasised. This is obvious from the decision in the *SERAC* case and the Nigerian cases examined in the article. Exploring supra-national adjudicatory mechanisms holds some promise. A wide gap existing between states' formal commitment to international human rights instruments and the effective implementation of the obligations thus created, giving much cause for concern.<sup>98</sup>

Here, the inauguration of the African Court of Human and Peoples' Rights is important. An institution with more than recommendatory powers is arguably the appropriate mechanism for reigning in the currently immense, largely unchecked, power of MNCs with regard to their human rights obligations focused on in this discourse. Considering their multi-national nature, an international court, such as the International Criminal Court (ICC), with supra-national composition and jurisdiction, may be even more effective. Thus, the composition, material and human resources of such an adjudicatory institution will be important to secure and retain the international respect and confidence required to meet the challenges of the global violations of economic, social and cultural rights by players with globalised resources.

The laws of standing before the Court, like those of the ICC, should similarly be liberal. It should provide for individual, group and third state or other interested party complaints alongside state-compliant

<sup>96</sup> Ratner (n 65 above) 463.

<sup>97</sup> S Chesterman 'Oil and water: regulating the behaviour of multi-national corporations through law' (2004) 36 *New York University Journal of International Law and Policy* 308.

<sup>98</sup> F Viljoen & L Louw 'The status of the findings of the African Commission: From global persuasion to moral obligation' (2004) 48 *Journal of African Law* 1 18.

procedures. The current state of the non-justiciability of economic, social and cultural rights in many state jurisdictions (especially in developing countries where the violations are most acute), coupled with the weakness or apparent lack of political will to ameliorate the violations of economic, social and cultural rights, particularly commend this approach on standing to institute proceedings. However, like the position on jurisdiction of the ICC, it is further suggested that the rules of complementarity which allow for priority to be accorded to adjudication of cases within the state courts, where this is available or the parties are willing to approach the courts, should be incorporated into an enabling statute for such a court.

It is worth noting that Shell, like other MNCs, recognises the need to obtain and maintain a cordial relationship with the communities in the Niger Delta in which it operates. What is in dispute is the way to secure and maintain that valuable relationship. It is certainly not by maintaining a culture of denial. A resort to satisfying rent-seeking individuals and groups provides a decidedly short-lived reprieve. What is required is a proactive approach which centres on the recognition of the company's obligations under international human rights law.

None of the parties to the conflict can reasonably expect to achieve a meaningful solution to the current debacle with their current stance. All concerned — the Nigerian government, the MNCs, the local communities and the international community — have to revise their current strategies. There is a need to embrace the opportunity offered by the broad framework of international human rights with defined rights and responsibilities for all sides. The repression or violence and all sorts of criminality can only exacerbate the issues. This unfortunately is still the current situation; the backlash resonates in today's global village.

It is important that the international community creates an enforceable treaty with an independent enforcement mechanism which can employ mandatory sanctions against MNCs. This accords with existing international law instruments such as the Universal Declaration and the UN Charter, which require concerted efforts for the universal entrenchment of human rights for all. It is no longer acceptable to maintain, as Nolan asserts, that 'international law generally, and human rights law in particular, is still undergoing the conceptual and structural evolution required to address their accountability'.<sup>99</sup> That process has gone on too long already. The existing soft laws can be transformed into enforceable mechanisms to rein in MNCs into the treaty framework. Such an approach holds the promise of pouring oil on the troubled waters of the Niger Delta.

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<sup>99</sup> Nolan (n 68 above) 3.